

Walz Masonry, Inc. and Laborers' International Union of North America, Local No. 1140. Case 17-CA-18092

July 16, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On January 29, 1997, Administrative Law Judge Martin J. Linksy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified in the amended remedy section below.

AMENDED REMEDY

In light of the judge's uncontradicted and unexcepted to finding that job applications were active for 30 days and that six laborers were hired during the time the discriminatees' applications would have been active, we agree with the judge's recommendation to

¹ The Respondent has requested oral argument. The request is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the General Counsel's introduction of an inaccurate tape recording of the events in question undermines the judge's credibility resolutions. The record, however, fails to establish that the tape recording was inaccurate, tampered with, or otherwise lacked integrity, the premise of the Respondent's contention. The Respondent's expert witness did testify that the copy of the recording he examined contained anomalies that suggested that the tape could have been altered. However, the expert also testified on cross-examination that the anomalies could be explained by physical or electronic problems such as a weak battery, dirt in the recorder, interference with the microphone, or the binding of the tape within its housing, and he repeatedly made clear that he could reach no conclusions as to whether the tape had been altered without examining the original tape and the recorder on which it was made. Although the Respondent suggested during the hearing that it would seek a continuance for its expert to examine the original recording, the Respondent did not make such a request, and, indeed, explicitly opposed the Charging Party's motion for a continuance to allow either the Charging Party's own expert or the Respondent's expert to examine the original tape. In addition, the judge discredited the testimony of the Respondent's witnesses, Linda Walz, Jennifer Walz, and Jacqueline Coco, to the extent it conflicted with the General Counsel's witnesses; thus, their testimony to inaccuracies in the recording is not credible. Accordingly, we find that the Respondent's contention lacks merit.

limit the reinstatement and backpay³ remedy to only 6 of the 10 alleged discriminatees and with his decision to leave the determination of which 6 are to be offered employment and backpay to the compliance stage.⁴

In addition, because the Respondent is, as found by the judge, engaged in the construction industry, we shall, in accord with *Dean General Contractors*, 285 NLRB 573 (1987), leave to the compliance stage of this proceeding the determination of whether the six discriminatees to be offered employment would have continued in the Respondent's employment after completion of the projects for which they would have been hired.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Walz Masonry, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following paragraphs for paragraph 2(a) and reletter the remaining paragraphs accordingly.

“(a) Within 14 days from the date of the compliance Order, offer 6 of the 10 discriminatees, as determined in the manner set forth in the amended remedy section of this decision, the jobs for which they were denied the opportunity to apply or, if those jobs no longer exist, to substantially equivalent positions.

“(b) Make those six discriminatees whole for any loss of earnings and other benefits as a result of the discrimination against them, as set forth in the amended remedy section of this decision.”

2. Substitute the attached notice for that of the administrative law judge.

³ Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴ The Respondent argues that the remedy should not, in any event, extend to alleged discriminatee Rod Edmonds because he failed to call the Respondent's office to indicate an ongoing interest in employment and thereby failed to fulfill the obligation the Respondent allegedly places on all applicants “to call back and keep their application alive.” We find the argument without merit. Edmonds had no employment application to “keep . . . alive” because of the Respondent's own unlawful conduct of refusing to permit him to file one.

⁵ The Respondent's president, Charles E. Walz, testified without contradiction that he gives hiring preference to former employees who have a good work record because they can do the work and no time needs to be spent training them. Consistent with *Casey Electric*, 313 NLRB 774, 776 (1994), we will, nonetheless, permit the Respondent the opportunity to show in compliance that the six discriminatees to be offered employment would not have been transferred to other projects after completion of the projects for which they would have been hired.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice.
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to consider for employment or fail and refuse to hire applicants for employment because they are members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the compliance Order, offer employment to 6 of the 10 following discriminatees, Kevin Sunderman, Craig Sunderman, Jay Denney, Ruben Escobar, Jeff Haith, Cliff Barnhart, Randy Weiss, Rick Inskeep, Tim Benesch, and Rod Edmonds, to the jobs for which they were denied the opportunity to apply or, if those jobs no longer exist, to substantially equivalent positions.

WE WILL make those six employees whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

WALZ MASONRY, INC.

Stephen E. Wamser, Esq., for the General Counsel.

Greg A. Naylor, Esq., of Des Moines, Iowa, for the Respondent.

M. H. Weinberg, Esq., of Omaha, Nebraska, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On June 15, 1995, a charge in Case 17-CA-18092 was filed by Laborers' International Union of North America, Local No. 1140 (the Union), against Walz Masonry, Inc. (Respondent).

On February 14, 1996, the National Labor Relations Board (the Board), by the Regional Director for Region 17, issued a complaint alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when

on June 6, 1995, it told union affiliated applicants for employment that it was nonunion and did not hire union members and when it refused to consider for employment and refused to hire 10 applicants for employment because of their affiliation with a union.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on November 5 and 6, 1996, in Omaha, Nebraska, and Council Bluffs, Iowa.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel, Respondent, and the Charging Party, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Omaha, Nebraska, is engaged as a masonry contractor in the construction industry doing commercial and industrial construction.

Respondent admits, and I find, that at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a nonunion masonry contractor who placed want ads in the Omaha World Herald that ran from May 12 to 18, 1995, June 1 to 7, 13 to 19, 1995, and June 25 to July 2, 1995, which stated "Mason Laborers Wanted. Experienced only, \$9/hr."

On June 6, 1995, 10 members of the Union went to Respondent's office located in a remote section of west Omaha to apply for employment. They were Kevin Sunderman, Jay Denney, Ruben Escobar, Craig Sunderman, Jeff Haith, Cliff Barnhart, Randy Weiss, Rick Inskeep, Tim Benesch, and Rod Edmonds. Two of the ten testified before me, i.e., Kevin Sunderman and Jay Denney. Both men impressed me as credible witnesses. These 10 men were referred to in this litigation as the overt salts. Earlier on June 6, 1995, 2 covert salts applied for work and after the 10 overt salts tried to apply for work with Respondent 2 more covert salts went to apply. A salt being a person who seeks employment with a nonunion employer in order to organize its work force.

Sunderman and Denney testified that they and eight other members of the Union went to Respondent's office to apply for positions that had been advertised in the paper. They wore union hats and jackets and told the people at Respondent's office that they were union, wanted to apply for work, and, if hired, would try to organize Respondent's employees.

The owner of Respondent is Charles Walz. He was not present in the office when the 10 applicants arrived but his wife, Linda Walz, vice president and secretary of Respondent, and his daughters, Jennifer Walz, a secretary, and Jacqueline Coco, Respondent's bookkeeper, were present. All

three women were stipulated by Respondent to be agents within the meaning of Section 2(13) of the Act.

Suffice it to say Respondent's hiring procedure, when Charles Walz is not present, is as follows: the women in the office have the applicants fill out applications and the applications are later reviewed by Charles Walz and he decides who is hired.

According to Kevin Sunderman and Jay Denney, whom I credit, the men said they were Union and were there to apply for jobs but were *not* given applications to fill out.

According to Linda and Jennifer Walz and Jacqueline Coco the men said they were from the Union and were there to *reorganize* the Company and to *take it over*. Sunderman and Denney credibly testified that no one said they were there to reorganize the Company or to *take over* the Company. I credit Sunderman and Denney over the women.

With respect to whether or not the union applicants were able to submit applications, Linda Walz testified that she told her daughter to give the men applications to fill out and Jacqueline Coco testified that she got a hand full of 10 to 12 applications and offered them to 1 of the union applicants but neither he nor any of the other 9 men accepted the offer of applications. Jennifer Walz was not in the office the entire time and did not see Coco offer applications or hear her mother tell Coco to do so.

Sunderman and Denney testified that no applications were offered to them.

I reject the testimony of Linda and Jennifer Walz and Jacqueline Coco in so far as it conflicts with the testimony of Kevin Sunderman and Jay Denney. I found them more credible than the women. The bottom line is, the 10 union applicants were not given job applications to fill out.

Kevin Sunderman tape recorded what occurred at Respondent's office. A copy of a copy of the tape was turned over to Respondent's attorney prior to the hearing. The copy of the copy of the tape was thereafter turned over to Stephen Cain, an expert in audio tape analysis. Cain testified at the hearing before me that he found a number of anomalies on the copy of the copy of the original type that he examined and concluded that the integrity of the original tape may have been tampered with, i.e., it was possible that parts of the original tape were deleted or parts added to the tape. He could not give a definitive opinion without examining the original tape and the recording devise used. Such an examination would take 2 days and cost \$5000, which would be in addition to his fee up to that point of \$6000 to \$7000. Before the hearing, Cain told Respondent's counsel that he wanted to examine the original tape and the recording devise but had not been given them. Respondent did not move for a continuance at the end of the hearing to permit such an examination but the Union did request a continuance to conduct its own scientific test of the original type and recording devise. I denied the request for a continuance because I felt it would unduly delay the outcome of this case. I could decide what occurred at Respondent's office on June 6, 1995, based on the testimony of the five witnesses who testified concerning the encounter.

Suffice it to say, the copy of the tape in evidence and the transcript also in evidence corroborated the testimony of Sunderman and Denney but because of Stephen Cain's testimony I am giving no weight, except as noted in footnote 1, to the tape and its transcript but am deciding what occurred

based on the witness' testimony and their demeanor. I would note that I credit the testimony of Kevin Sunderman that he did not tamper with the tape and what is on the tape and the transcript of it comport with his recollection of what occurred.

The 10 applicants who went to Respondent's office were bona fide applicants for employment—there being no evidence whatsoever to the contrary—and Respondent refused to let them submit applications for employment because of their union affiliation. This constitutes a violation of Section 8(a)(1) and (3) of the Act. See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995); *BE & K Construction Co.*, 321 NLRB 561 (1996); and *Casey Electric*, 313 NLRB 774 (1995).

Want ads for laborers appeared in the local paper before and after June 6, 1995, when the 10 applicants went to apply for work. In addition, as noted above, the Union not only sent in the 10 overt salts, who are the discriminatees in this case, who wore union hats and jackets and who said they were Union and wanted to organize Respondent and were denied the opportunity to submit applications but the Union also sent in so called covert salts on June 6, 1995, both before and after the 10 overt salts went to apply.

Prior to Sunderman and the other nine men going to Respondent's office two union members, Gregory Scott Ebler and David Kilpatrick, who were not wearing union indicia and who did not say they were with the Union, applied for work. Both Ebler and Kilpatrick were given applications to fill out by Jennifer Walz, they did so and handed them in to her. Neither man was contacted by Respondent or hired.

After the 10 overt salts were refused the opportunity to fill out applications 2 more covert salts, Gary Hansen and Benny DeSilva, went to Respondent's office, said they wanted to apply for work and were given, again by Jennifer Walz, applications which they filled out and handed in. Indeed, Hansen was told by Jennifer Walz that there was work and Respondent was hiring. Neither Hansen nor DeSilva were contacted or offered employment.

The contrast in Respondent's treatment of the 4 covert salts, not identified as union affiliated, who were given applications to fill out, and the 10 overt salts who were identified as union affiliated, but were *not* given applications to fill out establishes discrimination in the hiring process based on union affiliation.

Other evidence of discrimination in hiring is when Linda Walz asked the 10 overt salts to give her their name and number because she was going to turn them in to the Masonry Contractors Association. Rod Edmonds was the only one to give her a name and number. The number he left was the telephone number for the Union. When Charles Walz returned to the office later on June 6, 1995, he called the number and left a message for Edmonds that the position was filled. Apparently a position was filled by the hiring of Michael Rader by June 5, 1995, but Edmonds was never told that his name would be kept on file for a future opening.

Charles Walz testified that he employed 24 people in his Company to include 11 laborers and that he is always looking to hire laborers. Indeed between June 6, 1995, and October 11, 1996, he hired 39 laborers. More specifically, and because Walz testified applications for employment were active

for 30 days, Respondent's records reflect that laborers were hired by Respondent as follows:

June 14, 1995	James Kuehn
June 20, 1995	Jesus Bautist
	Jose Jimenez
June 22, 1995	Tim Kavan
June 27, 1995	Eduardo Soto Sanchez
	John Kreikemeir

Accordingly, it appears that 6 laborers were hired during the time that the 10 overt salt applicants' applications would have been active if Respondent did not violate the Act in refusing to let the 10 overt salts even fill out applications. In addition, two laborers were hired in July 1995, one in August 1995, two in August 1995, six in October 1995, and two in November 1995.

In light of the above, it is my conclusion that Respondent violated Section 8(a)(1) and (3) of the Act when it unlawfully refused to accept applications from the 10 overt salts on June 6, 1995. All 10 were experienced *Mason* laborers except Randy Weiss and Tim Benesch. Weiss and Benesch were, however, experienced laborers. Respondent advertised for *experienced* Mason laborers but hired Marc Zebley who had no experience as a laborer. Since there were six positions for laborers filled within the 30-day period following the time Respondent unlawfully refused to permit the filing of job applications by the 10 overt salts, offers of jobs and backpay should be made to 6 of the 10 discriminatees. Which six are offered employment and backpay can be determined at the time of compliance.¹

CONCLUSIONS OF LAW

1. The Respondent, Walz Masonry, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Laborers' International Union of North America, Local No. 1140, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent on June 6, 1995, violated Section 8(a)(1) and (3) of the Act when it refused to consider for employment Kevin Sunderman, Jay Denney, Ruben Escobar, Craig Sunderman, Jeff Haith, Cliff Barnhart, Randy Weiss,

¹ 1. It is alleged that Jacqueline Coco informed employees that Respondent was nonunion and did not hire union supporters or members. Jay Denney heard a woman say this but couldn't say which one. The transcript of the tape contains the following exchange:

KEVIN: Hi, I'm uh, Kevin Sunderman, and, uh, we're representin' Laborer's Local 1140.

SPEAKER 1: We're not interested. (inaudible)

KEVIN: We got an ad out of the paper sayin' that you (inaudible).

SPEAKER 1: We're not union. We're non-union.

KEVIN: So you won't take applications from union people.

SPEAKER 1: Uh huh.

KEVIN: What's your name?

SPEAKER 1: Jackie

KEVIN: Jackie

I listened to the tape at the hearing in the presence of Respondent's expert and all counsel but did not hear anyone say "Uh huh," which is attributable to Jacqueline Coco. Accordingly, I will not find an 8(a)(1) violation.

Rick Inskeep, Tim Benesch, and Rod Edmonds because of their union affiliation.

4. The Respondent on and after June 6, 1995, in the case of 6 of the 10 discriminatees listed in paragraph 3, above, violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire them because of their union affiliation.

5. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Walz Masonry, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for employment applicants for employment because of their union affiliation.

(b) Failing and refusing to hire applicants for employment because they are members of a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer 6 of the 10 discriminatees the jobs that they were denied the opportunity to apply for or, if those jobs no longer exist, to substantially equivalent positions at new jobsites, if necessary and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Omaha, Nebraska, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 15, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.